MALTA

COURT OF MAGISTRATES (MALTA)

MAGISTRATE DR.
CONSUELO-PILAR SCERRI HERRERA

Sitting of the 24 th April, 2013

Avviz Number. 200/2012

Mediterranean Wellbeing Co. Ltd [C 40909]
Vs
Samuel Kruse

The Court,

Having seen the application presented by the plaintiff company Mediterranean Wellbeing Co. Ltd [C 40909] on the 8th July 2012 in which it requested the Court to condemn the defendant Samuel Kruse:

'ihallas is-somma ta' erbat elef, mitejn u wiehed u ghoxrin ewro u tmintax–il centezmu tal-ewro (€4,221.18), rapprezentanti bilanc minn somma akbar dovuta ghal xoghlijiet maghmula fuq l-opra tal-bahar M.V. Christa Marie, ghal hlas parzjali li sar lil terzi f'ismu, u kif ukoll ghall-hlas t'ammont dovut ghal diversi materjali fornuti in konnessjoni mal-istess xoghlijiet, [Vide l-anness Dok A], liema ammont baqa' qatt ma gie mhallas minnu lis-socjeta' rikorrenti, u minkejja li gie interpellat diversi drabi

sabiex ihallas dan l-ammont lis-socjeta' rikorrenti, huwa baqa' inadempjenti.

Bl-ispejjez u bl-imghax legali mid-disgha w ghoxrin (29) ta' Ottubru 2009 sad-data tal-pagament effettiv kontra l-intimat li hu minn issa ingunt ghas-subizzjoni.'

Having seen the reply of defendant Samuel Kruse presented in Court on the 11th July 2012 where he pleaded:

1. "Illi preliminarjament, is-socjeta' rikorrenti ghandha tghid x'tip ta' azzjoni qed taghmel sabiex l-intimat ikun jista' jressaq l-eccezzjonijiet relattivi skond liema azzjoni qed tigi avvanzata fil-konfront tieghu;

2. Illi wkoll preliminarjament u bla ebda pregudizzju ghall-ewwel eccezzjoni, l-intimat m'ghandu l-ebda rabta guridika mas-socjeta' rikorrenti. Kwalsiasi xoghol li hu kien ikkummissjona, dan kien ghamlu direttament ma' persuni fizici li agixxew in personam u in nome proprio u fl-ebda waqt ma qalu lill-intimat li kienu qed jagixxu in rapprezentanza jew ghan-nom ta' persuna ohra, morali jew le. Ghalhekk, l-intimat ghandu jigi liberat mill-osservanza tal-gudizzju bl-ispejjez kontra s-socjeta' rikorrenti;

3. Illi preliminarjament ukoll u bla ebda pregudizzju ghas-sueccepit, it-talba tas-socjeta' rikorrenti hija, sa fejn applikabbli, preskritta ai termini ta' paragrafu (a) u anke paragrafu (b) ta' l-Artiklu 2148 tal-Kodici Civili (Kapitolu 16 tal-Ligijiet ta' Malta);

4. Illi subordinatament u minghajr pregudizzju ghas-sueccepit, is-socjeta' rikorrenti ghandha turi li ghandha locus standi u interess guridiku li toqghod fil-kawza u tavvanza l-prezenti pretensjoni.

5. Illi subordinatament u minghajr pregudizzju ghas-sueccepit, it-talba tas-socjeta' rikorrenti hija nfondata fil-fatt u fid-dritt u kwalsiasi allegazzjoni ghandha tigi debitament pruvata ai termini ta' l-Artikolu 562 tal-Kapitolu

12 tal-Ligijiet ta' Malta, flimkien ma' l-Artikoli 558 u 559 ta' l-istess imsemmi Kapitolu;

6. Salvi eccezzjonijiet ulterjuri permessi mil-Ligi.

Bl-ispejjez kollha kontra s-socjeta' rikorrenti."

Having seen the note of the plaintiff company that was presented on the 16th October 2012 in which it declared that the action of the plaintiff company is intended to recover the expenses incurred by the plaintiff company in the name of the defendant to recover the price of material provided to the defendant and to recover the rights which were not paid.

Having seen the note of the plaintiff company that was presented on the 24th October 2012 in which it declared that the action of the plaintiff company is based on the Article 1623 et seq of Chapter 16 of the Laws of Malta and Article 960 et seq of Chapter 16 of the Laws of Malta.

Having seen the affidavit of the defendant Samuel Kruse that was presented by means of a note on the 22nd November 2012 whereby he declared that he has known Mr Leif Goran Morgan Erikson for around five years. He needed someone to carry out works on his yacht, Christa Maria, which works consisted mainly in sandblasting and painting of the hull of the boat. However he was informed by Mr Leif Goran Morgan that further works were necessary. The works that were carried out are indicated in the attached Doc A though it must be pointed out that the works indicated in point 10 had been carried out by another person and not by Mr Leif Goran Morgan Erikson and the other workers who were assisting him. The works carried out require a person of a certain trade to be carried out.

The defendant stated that he had commissioned these works in winter 2008 around November or December. He had stopped the works because he was not satisfied by the way in which they were carried out. He felt that he was being overcharged for these works. The works were

finished in May 2009 and he paid soon after upon request of Mr Morgan Erikson. The defendant stated that he never received any request for payment from Mr Morgan Erikson or any other person or company until he received the judicial letter on the 20th October 2011, the judicial letter dated 10th December 2010.

He said that he had always dealt with Mr Leif Goran Morgan Erikson but he knew that he was working also with Mr Kenneth William Donaldson as regards the works which they were carrying out on his yacht. He never heard of Mediterranean Wellbeing Company Ltd before these judicial proceedings. However he had received from Mr Kenneth William Donaldson a balance of payments due (Doc. B) by means of an email dated 31st August 2009 in the names of the company Advanced Yacht Systems Ltd, which was the first time he had heard of this company. He was led to believe that he had commissioned Mr Leif Goran Morgan Erikson and his partner Mr Kenneth William Donaldson to carry out the said works.

Kenneth Donaldson on behalf of Mediterranean Wellbeing Company Limited gave his evidence on the 23rd January 2013 and stated that he occupies the position of company director of the plaintiff company. He said that Samuel Kruse had asked for some repairs to be carried out on the vessel MV Christa Marie, and these works were carried out in the period February 2009 ending May-June 2009. These were painting, underwater works, and other similar works including engineering works as mentioned in the invoice Document A exhibited in the acts of the proceedings. This document relates to the materials which were used, for the execution of these works. Whilst the works were being carried out he remembers that he has sent a number of emails to the defendant. Mr Kruse had always informed him that the boat in question was being used for charter and that the boat was foreign flagged. He had told him that the boat in question belongs to a company, however he had never stated who the company was. He asked Donaldson to invoice him excluding VAT, because the boat was exempt from VAT payment. He had to present the VAT exemption and the documentation

relative to such exemption necessary not to accept VAT. However by October of the same year, the witness had run out of time from this and he can confirm that the defendant never gave him such exemption and consequently he issued the invoice together with VAT of eighteen per cent. The witness had asked him various times to affect payment with great difficulty, however he never paid up. He had also sent him an official letter on 29th October 2009, and till today he received no payment.

Asked if he ever met Samuel Kruse, after the issue of such invoices and after the works have been carried out, he said yes, in fact they had exchanged correspondence stating that they should meet in a bank in Naxxar. The witness exhibited a copy of this correspondence which the Court marked as document Z. He believes that they have met on 2 October 2009 in the Bank of Valletta in Naxxar. The defendant had wanted the witness to reimburse him the amount of money he had given on behalf of this bill, which money was given from his own personal account so that he could substitute such payment with payment from behalf of his company. He had asked Donaldson to refund him first, subsequently in the next few days he would reimburse him. Naturally the witness did not agree to that and so their meeting was held for nothing.

The witness exhibited another document which was marked as document X which indicates the tranfers which were done from Samuel Kruse's account and directed to the company. The supplies and works were not carried out in one go. He continued to seek approval from the defendant whilst the works were being done. He exhibited an email in this regard which the Court marked as document B4. He exhibited also an email which is dated 16 October 2009, whereby he had asked the defendant, why he was not replying to his communications and he also said in his reply that he was abroad and he was very busy and that he would get back to the witness, the moment he would get back to Malta. This email was marked as document A3. He also exhibited another email dated 9 February 2009, which was marked as document

A1 which is an approval that the witness had when the works were being carried out. He confirmed that he had a very good relationship with the defendant, Samuel Kruse who is a web site designer. In fact together with his manager Susanne Schembri, the witness had asked him to design a web site for his company. Naturally the defendant knew that it was his company. He declared that here they cannot say that the relations were good.

Samuel Kruse in cross-examination gave his evidence on the 20th February 2013 where he declared that he owns in his personal capacity the vessel MV Maria Kristina which has a Maltese flag. He confirmed the evidence given in his affidavit in particular that exhibited on page 19 of the acts of the proceedings in particular once again that he never received any request from payment from Mr Morgan Ericson or any other person until he received the judicial act on 20 October 2011. He confirmed once again that no one else asked for payment.

Asked what is Document B exhibited on page 22, he said that this is a statement indicating the expenses incured in relation with MV Krista Marie. Asked when this was sent to him, he said that he does not have the date. Asked who sent him this document he believes that it must have been Kenneth Donaldson. He confirmed that the works on this statement were actually carried out and he also confirmed that these payments were actually affected. The balance indicating €6,169.36 was paid by him last spring, and he made a cash paymment to Mr Morgan Ericson. The witness paid the balance when the works on the boat were finished, which was in May 2009 when the works were completed.

The witness stated that he is absolutely certain that he had not heard of the name of the plaintiff company prior to receiving the judicial letter as he mentioned in his affidavit. However he subsequently saw this name in the emails. He also realised afterwards that in actual fact he had made bank transfers to this same plaintiff company at the time when he was not paying cash to Mr Morgan Ericson. In fact he was insisting on making bank transfer for the

payment, and after some time he was given a bank account where to transfer the money. Asked why the witness did not pay the balance in bank transfer since he was not happy paying in cash, he said that everything went to Kenneth Donaldson and he insisted that the money should be paid cash.

The witness stated that he was asking for receipts for each payment which he made, he was promised to be given receipts by Mr Ericson but he was not given receipts. Asked if he saw Mr Donaldson he answered yes, they live in the same city, so the witness has come accross him. Basically they have met by chance. In fact he remembers meeting him in the bar last autumn when he coincidentaly went to this bar to meet Mr Morgan Ericson and Kenneth Donaldson at that time came in too. Subsequently an argument developed between them. That was the only time that the witness met him although he has seen him on other occasions. He remembers on one ocassion that Mr Donaldson was insisting to meet him at the bank because he was very nervous, because he had some VAT audit on his company. The witness does not know which company as he did not specify and he wanted to refund the money that the witness placed in his bank account. The meeting was held though no refund was done. He wanted to pay the witness back these €6000 that he paid to his bank account because according to what he told him, he had VAT audit on his company, and thus it was important for him, to return this money to the witness and get paid in cash. The witness said that he was not very happy to do so. It was not in his interest to do this as he had nothing to do with his VAT issues.

Asked if Mr Donaldson asked for his approval before the works started, the witness cannot answer. However as the works were going on he did go on site to see what was going on, but he does not recollect that he had any approval in writing.

Considerations.

The Court heard the parties plead and discuss the second, third and fourth defence pleas raised by the defendant in his note of exceptions dated 11th July 2012 (fol. 9) together with the defendants plea of prescription based on Article 2148 (a) of Chapter 16 of the Laws of Malta raised in the sitting of the 23rd January 2013 (fol. 27).

The Court also heard the parties authorise her to proceed with a preliminary judgement on the points raised in the sitting of the 4th April 2013 regarding the exceptions here in just mentioned.

Legal Consideration.

The defendant submitted in his note of defence that he has no juridical representation with the plaintiff company and thus should not be held responsible for the plaintiff action since he claims to have acted with a physical person Kenneth Donaldson de proprio and not with the physical plaintiff company.

The Court feels it necessary at this early stage to make reference to jurisprudence with regards to such plea better known in the Maltese language as "*nuqqas ta' rabta guridika".*

According to the judgment delivered by the Appeal Court in its Inferior Jurisdiction in the names '**Korporazzjoni Ghas-Servizzi Ta' L-Ilma Pro Et Noe Vs Emmanuel Grixti'** a definition to what amounts to a guridical relationship was given. It held that:-

"*B'relazzjoni guridika wiehed necessarjament jifhem l-ezistenza ta' rapport bejn zewg partijiet in virtu ta' liema l-wiehed, kreditur, ghandu d-dritt jippretendi minghand l-iehor, id-debitur, li dan jissodisfa l-obbligazzjoni tieghu. Obbligazzjoni din li tista' tkun wahda kemm "di dare" jew "di fare" jew "di non fare". Tali rapport obbligatorju jista' jkun wiehed f' sens strett u jista' jkun jkollu wkoll dimensjoni aktar wiesgha;*

Ftehim bejn id-debitur u terza persuna li biha t-terza persuna tassumi l-obbligu tad-debitur fil-konfront tal-kreditur liema ftehim jigi komunikat lill-kreditur"

In the case given in the names '**Frankie Refalo et vs Jason Azzopardi et'** delivered on the fifth (5) October 2001 by the Appeal Court, the following was stated with regards to the institute of who is the right person to sue in a court case:

Biex jigi stabilit jekk parti in kawza kienetx jew le legittimu kontradittrici tal-parti l-ohra, l-Qorti trid bilfors tivverifika prima facie jekk il-persuna citata fil-gudizzju, kienetx materjalment parti fin-negozju li, skond l-attur, holoq ir-relazzjoni guridika li minnha twieldet l-azzjoni fit-termini proposti.

Jekk dan in-ness jigi stabbilit, il-persuna citata setghet titqies li kienet persuna idoneja biex tirrispondi ghat-talbiet attrici, inkwantu dawn ikunu jaddebitawlha obbligazzjoni li kienet mitluba tissodisfa dan inkwantu il-premessi ghaliha, jekk provati, setghu iwasslu ghall-kundanna mitluba f'kaz li jinstab li l-istess konvenut ma jkollux eccezzjonijiet validi fil-ligi x'jopponi ghaliha. Dan, naturalment ma jfissirx li jekk il-Qorti tiddeciedi li l-konvenut kien gie sewwa citat inkwantu jkun stabbilit li l-interess guridiku tieghu fil-mertu kif propost mill-attur illi hu kellu necessarjament ikun finalment tenut bhala l-persuna responsabbli biex tirrispondi ghat-talbiet attrici kif proposti, kif lanqas ifisser li l-istess konvenut ma jkollux eccezzjonijiet validi fil-mertu, fosthom dik li t-talbiet attrici kellhom fil-fatt ikunu diretti lejn haddiehor ukoll inkwantu dan ikun involut fl-istess negozju u li allura seta' jigi wkoll citat bhala legittimu kontradittur fil-kawza.

Id-dikjarazzjoni tal-Qorti li parti 'n kawza tkun legittimu kontradittur lanqas ma kienet tfisser li l-Qorti ma setghetx, fil-konsiderazzjoni tal-eccezzjonijiet opposti ghat-talbiet, tasal ghallkonkluzzjoni li l-konvenut - dikjarat prima facie legittimu kontradittur- kien wara t-trattazzjoni tal-kawza

jirrizulta ghal kollox estranju ghar-responsabilitajiet lilu addebitati mill-attur fl-azzjoni minnu tentata".

The court feels that it also has to make reference to the judgment correctly referred to by the defendant in the names '**Camel Brand Co Ltd Vs Debono Michael'** delivered on the 23rd March 2002 by the First Hall Civil Court wherein it was opined that:

"*Meta negozju jkun gestit minn socjeta` b'responsabilita` limitata, u ghaldaqstant minn persuna guridika indipendenti, huwa l-obbligu taghha li tindika dan fl-aktar mod car u inekwivoku lit-terzi li jkunu qeghdin jinnegozjaw maghha.*

Tali indikazzjoni ghandha ssir ukoll fuq l-invoices, statements, etc. relatati ma' akkwisti maghmula minnha. Fin-nuqqas ta' tali indikazzjoni espressa t-terz ghandu kull dritt jipprezumi li qieghed jinnegozja ma' individwu, u fil-fehma tal-Qorti ma jistax jippretendi mod iehor.

Normalment bniedem jikkontratta ghalih inniffsu, sakemm ma jindikax li qieghed jikkontratta f'isem haddiehor, jew jekk dan ma jindikahx espressament, il-kontraent l-iehor ikun ragonevolment jaf li jkun qieghed jikkontratta f'isem haddiehor. Il-piz tal-prova li min jikkontratta ghamel hekk f'isem haddiehor tinkombi fuq min jaghmel l-allegazzjoni"

A close look at the judgment in the names **'Legend Real Estate Limited vs Ron Chetcuti'** delivered on the 20th October 2003 by the Court of Appeal which stated the following:

"*F'kaz bhal dan l-konvenut ghandu definittivament u konvincevolment jipprova mhux biss li l-ftehim sar ghas-socjeta gestita minnu imma ukoll li fil-mument meta sar tali ftehim s-socjeta konvenuta kienet konsapevoli tal-fatt illi hu kien qed jagixxi in rappresentanza tas-socjeta tieghu. Dan hu abbanda ment pacifiku fil-gurisprudenza taghna*."

It made reference to other court judgments which held that:

*'Hija haga minn lewn id-dinja li bniedem normalment jikkuntratta ghalih innifsu sakemm ma jindikax li qieghed jikkontratta f'isem haddiehor jew jekk dan ma jindikax espressament il-kontraent l-iehor ikun ragonevolment jaf li jkun qieghed jikkontratta f'isem haddiehor. (**Frank Cilia nomine vs Charles Scicluna** delivered by teh Commercial Court on the 27 th April 1992 and **Anthony Caruana et vs John Magro et** delivered by the Court of Appeal on the 6th October 1999.*

In the case under examination it transpired that Kenneth Donaldson explains how in his capacity as Director of the plaintiff company he had carried out some works for the defendant on a boat named Christa Maria. He said that the defendent had informed him that the boat had a foreign flag and was owned by a company, however he stated that invoices were to be sent to him and without VAT since he alledged that the boat was VAT exempt. He explains that he had asked for documents highlighting such exemption though the defendant never passed them on to him so he issued the invoices with a VAT rate of 18%. However notwithstanding that he carried out the work and he sent the invoices he was never paid for the work he was entrusted to do.

Mr Donaldson explains that in fact the accused had already made a payment in his personal capacity as witnessed in the bank statement exhibited in the acts of these proceedings marked as Dok X. It results that on the 26th March 2009, the defendant de proprio had paid the sum of three thousand Euro to the plaintiff company.

The witness however explains that after this was done he was asked by the defendant to reimburse him with this money so that the same amount of money could be paid by a company. He however disagreed since he did not trust him and thus kept such deposit on account. The witness also exhibited an exchange of correspondence which indicated the negotiations that were going on and

and under the name of the witness Kenneth Donaldson there appears the name of the plaintiff company Mediterranean Wellbeing Co ltd. It appears from an examination of this correspondence that the defendant always acknowledged the emails that were sent to him by the plaintiff company and he replied to them in a personal capacity. Even the e-mail dated 29th September 2009 marked as document B4 a fol. 41 indicated that the demand for payment was made on behalf of the plaintiff company and once again the defendant replied in his personal capacity.

Samuel Kruse in his evidence of the 20th February 2013 admits that he made bank transfers to the plaintiff company although he says that at the time he was not aware that the money he transferred was sent to a company. He also says that he had not heard of the name of the plaintiff company prior to receiving the judicial letter although later on, in his same evidence he states that in fact he saw the plaintiff company name on a number of emails that were exchanged on this matter.

Thus from the above. it appears clear and unequivocal that the defendant was dealing with the plaintiff company through its Director Kenneth Donaldson and that the defendant knew about all this all the way. It is the opinion of the Court that such exception is frivolous in the light of the evidence brought forward by the same plaintiff company thus such pleas is being rejected.

With regards to the second plea of exception regarding prescription the Court has the following to say.

It appears from the statement exhibited by the defendant dated August 2009 exhibited fol. 21 marked as document A that the plaintiff company was given a contract of works to carry out a number of small jobs relating to repairs to be carried out on the vessel Christa Maria. However according to the evidence given by the defendant in his affidavit works started around November or December 2008. He also stated that the works were stopped in May 2009 and as far as he knew he had paid for the works

carried out until he received a judicial letter demanding payment dated 10th December 2010 which letter he received on the 20th October 2011. The defendant believes that the action for payment is prescribed in the first place by article 2148 (a) of Chapter 16 of the Laws of Malta.

This Article 2148 (a) provides the following:-

2148. *"The following actions are barred by the lapse of eighteen months:*

(a) actions of tailors, shoemakers, carpenters, masons, whitewashers, locksmiths, goldsmiths, watch-makers, and other persons exercising any trade or mechanical art, for the price of their work or labour or the materials supplied by them"

According to the judgment given in the names **'David Cilia f`isem u ghan-nom ta` Mario Cilia assenti minn dawn il-Gzejjer *vs* Hal Mann Limited',** delivered by the First Hall Civil Court:

*"L-Art. 2148(a) jirreferi ghall-krediti ta' artefici li jipprestaw l-opera taghhom u mhux ghall-appaltatur ta' l-opra li ghaliha l-materjali jkunu servew (**Kollezz. Vol XLI.I.347**)."*

This train of thought is in fact the reasoning given in an earlier judgment where it the Court held the following:

*'Fid-decizjoni riportata fil-**Kollezz. Vol. XXXVIII P III p 710** jinghad hekk:*

Il-preskrizzjoni ta' tmintax-il xahar li tolqot l-azzjonijiet tal-hajjata, skrapan, mastrudaxxi, bennejja,bajjada, haddieda, argentiera, arluggara, u persuni ohra li jahdmu sengha jew arti mekkanika, ghall-prezz ta' l-opri taghhom jew tax-xoghlijiet taghhom, jew tal-materjal li jfornu, tirriferixxi ghal-lokazzjoni ta' opera li biha dawk ilpersuni jkunu obbligaw ruhhom li jaghtu x-xoghol taghhom, u mhux ghal-locatio operis li biha l-imprenditur jobbliga ruhu li jaghti, mhux ix-xoghol, izda l-prodott taxxoghol - meta l-

lokazzjoni d' opera tkun konnessa ma' organizzazzjoni ta' mezzi teknici li timprimi lil-lokazzjoni l-karattru ta' att oggettivament kummercjali.'

Undoubtedly in the case under examination the work that had to be carried out by the plaintiff company was that resulting from a contract of works and thus this article of the law is not applicable.

In the defendant's note of exceptions the defendant also gives an alternative article claiming that the action of the plaintiff company is also prescribed according to Section 2149 (b) of Chapter 16 of the Laws of Malta. This provides the following:

2149. *The following actions are barred by the lapse of two years:*

(a) actions of builders of ships or other vessels, and of contractors in respect of constructions or other works made of wood, stone or other material, for the works carried out by them or for the materials supplied by them;

In the judgment delivered on the 1st July 2007 in the names ***'Salvu Attard vs Mark u Georgeann Meilak'*** it was stated that:

'L-artikolu 2149(a) *jipprovdi li l-azzjonijiet tal-kuntratturi ta' bini jew ta' xogholijiet ohra ta' njam, jew materjal iehor ghall-opri mahdumin minnhom jew ghall-materjal li jfornu jaqghu bi preskrizzjoni ta' l-gheluq ta' sentejn. Jiddependi hafna mill-agir u l-intenzjoni tal-partijiet u jekk l-intenzjoni kienetx wahda di dare l-kuntratt ghandu jitqies bhala bejgh waqt li jekk l-intenzjoni kienet di fare japplikaw il-principji ta' lappalt [Qorti Kummercjali,* ***George Camilleri vs Joseph Mamo noe,*** *28/08/1951, Kollez. Vol. XXV.iii639), u* ***George Vassallo vs Lawrence Fenech et noe****, 26/04/1988, u Appell Inferjuri Civili,* ***Frederick Micallef noe et vs May Sullivan****, 22/11/2002]. Hu sufficjenti li wiehed ihares lejn in-natura tax-xogholijiet li gew esegwiti mill-attur fejn minbarra li sar xoghol tal-konkos', l-attur ipprovda wkoll il-materjal u l-armar;'*

It further stated that:-

*"Illi sabiex tigi determinata liema hija l-preskrizzjoni applikabbli ghall-azzjoni partikolari wiehed irid jezamina ddispozizzjonijiet partikolari tal-kuntratt li minnu titwieled lazzjoni, u fl-ewwel lok jistabilixxi s-sustanza tar-relazzjoni guridika ezistenti bejn il-partijiet. Id-dispozizzjoni taht lartikolu 2149(a) ma tikkontemplax il-kaz ta' forniturі ta' materjal in genere, izda tal-forniturі li jsiru minn ….. appaltaturi ta' xogholijiet, li flimkien mal-opra taghhom ikunu in konnessjoni mal-istess opera fornew ukoll ilmaterjali mehtiega [(Ara **A.M.C. Marketing Ltd. vs Pletz Holdings Ltd.** deciza mill-Prim'Awla Qorti Civili fit-22 ta' Frar 2002). Hekk gie ribadit ukoll fis-sentenza deciza mill-Qorti ta' l-Appell fl-ismijiet **Paul Formosa vs Salvu Debono** deciza fil-5 ta' Ottubru 2001]."*

In the case under examination that plaintiff company is asking the court to condemn the defendant to pay her a sum of money as indicated in its application which sum represents balance from a large sum representing works carried out on the vessel Christa Marie as well as for the purchase of materials bought to carry out the same work. Thus this is really the scenario that applies to that case in question.

Now as was stated earlier on by the same defendant, the plaintiff started carrying out his works in the months of November / December 2008 and stopped working in the month of May 2009. Thus it is from this same Month May 2009 that the two year prescription period applies.

It appears that the first judicial act which the plaintiff company presented against the defendant was filed on the 10th December 2010. The defendant however iterates that this act has no validity with regards to the presciption plea since it was notified to the defendant on the 20th October 2011 much later than the two years entertained by law for Court action to be taken.

As explained in the judgment given by the Court of Appeal in the names '**Emanuel Calleja vs Anthony Portelli'** delivered on the 29th November 1971:

"*Iz-zmien ta' preksrizzjoni jrid jitqies b'referenza ghall-azzjoni kif bazata."*

Reference is here being made to the judgment in the names '**Pasquale Bonello vs Matteo Grech'** delivered by the Commercial Court on the 9th January 1875 where it was held that the plea of prescription is the exception to the action "*la prescrizione e una eccezione opposta alla azione, ed e regola invariabile che il convenuta in questo caso diventa attore, spettando a lui di provare cio che serve di fondamento alle sue eccezione – (**Chardon Del Dolo e delle Frode Vol 1 Toullier Vol. 4 para 612***)."

Thus the plea of prescription is the exception to the present plaintiff action so much so that the defendant becomes plaintiff to prove his plea and thus has to indicate that the action was taken too late after the two year period allowed by law (Vide **Mario Zammit vs Lawrence James Cappello et** decided on the 19th November 1962 by the Court of Appeal Sede Civili).

It results that the judicial act was presented within the two years permitted by law but notified after the two years.

Article 2128 of Chapter 16 of the laws of Malta provides the following:-

"*Prescription is also interrupted by any judicial act filed in by judicial act the name of the owner or of the creditor, served on the party against whom it is sought to prevent the running of prescription, showing clearly that the owner or creditor intends to preserve his right."*

In no circumstances does the law say that such judicial act has to be notified. It only speaks about the act being presented. In this respect there does not seem to be any contestation since it is the

defendant himself to outline such dates and consequently such plea is also being rejected.

Consequently, the Court is hereby rejecting the pleas regarding to 'nuqqas ta' rappresentanza guridika' and prescription raised by the defendant and orders the continuation of the case on its merits.

The Court reserves the question of expenses for the final judgement when it pronounces itself on the merits.

< Partial Sentence >

----------END----------